Selkirk Cogen Partners, L.P., Docket No. QF89-274-001

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Selkirk Cogen Partners, L.P., Docket No. QF89-274-001

Order Granting Application for Recertification as a Qualifying Cogeneration Facility

(Issued June 1, 1990)

Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

On January 17, 1990, as supplemented on February 21 and March 27, 1990, Selkirk Cogen Partners, L.P. (Selkirk Cogen or Applicant) submitted for filing an application for recertification as a qualifying cogeneration facility, pursuant to section 292.207 of the Commission's regulations, [1] for its Selkirk facility, a topping-cycle cogeneration facility to be located in Selkirk, New York. Notice of the application was published in the *Federal Register*, [2] with comments, protests, or motions to intervene due on or before March 2, 1990. No comments, protests, or motions to intervene have been filed.

The facility was previously certified as a qualifying cogeneration facility on September 28, 1989. [3] The application for recertification has been filed because of a change in the ownership of the facility and an increase in the gross electric power production capacity from 81 MW to 82.5 MW. [4] Ownership of the facility has been transferred to Selkirk Cogen, a Delaware limited partnership. JMC Selkirk will hold a 79.2-percent interest as a general partner, Makowski Selkirk, Inc. (Makowski Selkirk),

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will hold 0.8 percent as a limited partner, and Old State Management Corporation will hold the remaining 20 percent, part as a general partner and part as a limited partner. [5] JMC Selkirk and Makowski Selkirk are both special-purpose wholly owned subsidiaries of J. Makowski Co., Inc. (J. Makowski), a Boston-based energy project development firm. The application states that no electric-utility company, electric-utility holding company, or combination thereof has any ownership interest in the facility.

The facility will consist of a combustion turbine generator, a supplementary fired heat recovery steam generator, and a noncondensing steam turbine generator. Thermal energy recovered from the facility will be sold to the General Electric Company for space heating and for use in the manufacturing of plastics. The primary sources of energy will be natural gas (97 percent) and a gaseous by-product of General Electric's manufacturing process (3 percent). Also, the heat recovery boiler will be supplementary fired on an intermittent basis with an equal mixture of a General Electric manufacturing liquid by-product and No. 2 fuel oil. Financing for the project was scheduled to close on May 18, 1990. [6]

On February 21, 1990, Selkirk Cogen supplemented its application in response to questions from the Commission's staff. Staff's questions focused on the relationship between J. Makowski's interests in Selkirk Cogen and its interests in the Ocean State Power Project (Ocean State), a gas-fired electric generating facility under construction in Rhode Island.

In response, Selkirk Cogen stated that JMC Selkirk and Makowski Selkirk are indirectly related to Ocean State through J. Makowski. J. Makowski has two wholly owned subsidiaries in each of the two partnerships which own the two development phases of Ocean State.

Selkirk Cogen argues that J. Makowski's interests in Ocean State do not make it either an electric-utility holding company or an electric utility. With regard to the former, the Applicant explains that J. Makowski's participation in Ocean State has been structured to avoid having J. Makowski classified as an electric-utility holding company under section 2(a)(7) of the Public Utility Holding Company Act of 1935 (PUHCA). [7] According to section 2(a)(7), a holding company is any company which directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of a public-utility company. [8] According to the Applicant, prior to the dates on which the Ocean State I and II partnerships become electric-utility companies under PUHCA, i.e., begin generating and selling test power, [9] J. Makowski will, through its

subsidiaries, hold a 10.1-percent voting interest in each Ocean State partnership; however, on the date the Ocean State I and II partnerships become electric-utility companies under PUHCA, the voting interest held by J. Makowski's subsidiaries will automatically be reduced to 4.9 percent. Selkirk Cogen asserts that the voting interest is being reduced specifically to avoid having J. Makowski classified as a holding company or affiliate of an electric-utility company under PUHCA.

By letter dated January 7, 1988, the Ocean State Power partnership provided an explanation of its structure to the staff of the Securities and Exchange Commission (SEC) and requested a "no-action" letter [10] regarding, *inter alia*, J. Makowski's status vis-a-vis section

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2(a)(7) of PUHCA. [11] The Ocean State Power partnership argued that Ocean State would not become an "electric-utility company" under PUHCA [12] prior to the dates on which the facility first sells test power, and that since J. Makowski's voting interest would drop to 4.9 percent at that time, it should not be classified as a holding company under PUHCA.

The Staff of the Division of Investment Management of the SEC's Office of Public Utility Regulation responded that it would not recommend enforcement action by the SEC pursuant to PUHCA if the parties to the Ocean State Power partnership proceed with the transactions in the manner described. Specifically, the SEC staff stated that it would not recommend any action by the SEC which would result in J. Makowski being deemed a holding company with respect to Ocean State Power, as that term is defined in section 2(a)(7) of PUHCA, on account of the transactions described. [13] Based on this, Selkirk Cogen claims that J. Makowski, parent company to JMC Selkirk and Selkirk Makowski, is not an electric-utility holding company. In addition, Selkirk Cogen maintains that the SEC's September 28, 1989 order approving the construction financing for the Ocean State Power II project suggests that it does not regard J. Makowski as a holding company. [14]

Selkirk Cogen next argues that J. Makowski is not an electric utility under the FPA, as it does not engage in the sale of electric energy. [15] According to Selkirk Cogen, only the entity actually selling electric energy is deemed to be an electric utility. Selkirk Cogen argues that use of the term "person" [16] in the definition of electric utility does not reach upstream to the parent company of the selling utility. [17] While Ocean State may become an electric utility when it commences the sale of electric energy, Selkirk Cogen argues that J. Makowski is not, and will not become, an electric utility by reason of its indirect ownership interest in Ocean State.

Discussion

Upon consideration of the application, the additional pleadings, the applicable statutes, and relevant case law, we find that no electric-utility holding company or electric utility holds in excess of 50 percent of the equity interest in Selkirk Cogen. Therefore, we will grant the application.

The statutory ownership criteria governing qualifying cogeneration facilities appear in section 3(18)(B) of the Federal Power Act (FPA). Under that section, in order to be a qualifying cogeneration facility, the facility must be:

> owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities). [18]

The Commission's regulation implementing that provision, section 292.206(b), states that:

> a cogeneration . . . facility shall be considered to be owned by a person primarily engaged in the generation or sale of electric power, if more than 50 percent of the equity interest in the facility is held by an electric utility or utilities, or by an electric-utility holding company, or companies, or any combination thereof. If a wholly or partially owned subsidiary of an electric utility or electric-utility

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> holding company has an ownership interest of a facility, the subsidiary's interest shall be considered as ownership by an electric utility or electric-utility holding company. [19]

The Commission has interpreted "equity interest," as applied in a partnership context, in several cases. The Commission has explained that the decisive factors are the "stream of benefits" from the project and control of the venture. [20] The cases have

defined the term "stream of benefits" as the distribution of profits, losses and surplus from a venture. [21] Additionally, the cases have examined control of the venture in order to determine how partners share in all aspects of the partnership, with the inquiry focusing on voting interests as well as special agreements (such as service contracts) between utility partners (or their affiliates) and the partnership. [22] In short, we look to the investment in and the realization of gain from the venture, and not merely the exercise of control, to determine the equity interest. [23]

JMC Selkirk's "equity interest" in Selkirk Cogen, now the owner of the facility, is such that if JMC Selkirk were an electric utility, an electric-utility holding company, or a subsidiary of either, the facility would be considered to be owned by a person primarily engaged in the generation or sale of electric power. [24] As stated above, JMC Selkirk is a wholly owned, single purpose subsidiary of J. Makowski. Pursuant to the "upstream" test provided in the second sentence of section 292.206(b) of the Commission's regulations, [25] JMC Selkirk's interest in Selkirk Cogen (and Makowski Selkirk's interest) are attributed to J. Makowski. Therefore, if J. Makowski is found to be an electric utility, an electric-utility holding company, or a combination thereof, its holding would exceed the limitation in section 292.206(b).

A. *Electric-Utility Holding Company*

We find that J. Makowski is not an electric-utility holding company as that term is defined in our regulations. According to section 292.202(n) of the Commission's regulations, [26] an electric-utility holding company is a holding company as defined in section 2(a)(7) of PUHCA which owns one or more electric utilities as defined in section 2(a)(3) of PUHCA, but does not include any holding company which is exempt by rule or order adopted or issued pursuant to section 3(a)(3) or section 3(a)(5) of PUHCA. [27] As stated earlier, under section 2(a)(7) of PUHCA, a holding company is any company which directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of a public-utility company or holding company, "unless the Commission [SEC], as hereafter provided, *by order* declares such company not to be a holding company . . . ." [28]

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The SEC's order to Ocean State Power II, [29] outlines the holdings of the various partners in Ocean State Power II, including the interests held by subsidiaries of Eastern Utilities Associates and New England Electric System, both registered holding companies, and the interests held by TCPL Power Ltd., an affiliate as described in section 2(a)(11) of PUHCA. [30] J. Makowski's interests are also discussed, but J. Makowski is not described as either a holding company or an affiliate based on the interests it holds, through subsidiaries, in Ocean State Power II. The order concludes that, based on the facts in the record, the applicable standards of PUHCA and the rules promulgated thereunder are satisfied. The Applicant argues that the SEC could not have made such a finding if it believed J. Makowski was a holding company with respect to its interest in Ocean State Power II.

While J. Makowski has not filed an application for or obtained an order from the SEC stating that it either is or is not an electric-utility holding company under section 2(a)(7) of PUHCA, or that neither J. Makowski nor its subsidiaries in Ocean State are electric-utility companies under section 2(a)(3) of PUHCA, or sought exemption under either section 3(a)(3) or section 3(a)(5) of PUHCA, J. Makowski clearly has structured its participation in the Ocean State project in order to avoid being classified as an electric-utility holding company. [31] However, we believe the order on project construction financing for Ocean State Power II issued by the SEC suggests that it does not regard J. Makowski as an electric-utility holding company. Further, a no-action letter, such as that obtained by the Ocean State partnership concerning the status of certain members of that partnership, while not purporting to express a legally binding conclusion of the SEC on the issues presented, does represent the SEC staff's position with regard to initiating an enforcement action under PUHCA. Therefore, the SEC staff recommendation against enforcement with respect to J. Makowski's status as a holding company corroborates our findings that J. Makowski is not an electric-utility holding company under section 292.202(n). [32]

B. *Electric Utility*

We also find that J. Makowski is not an electric utility. In Long Lake Energy Corporation, Docket No. EL90-4-000, also decided today, we find that the activities and business character of a subsidiary corporation are not attributed "upstream" to its parent corporation. *Long Lake* holds that the terms "person" and "corporation," as defined in the FPA [33] and used in describing an electric utility, do not contemplate reaching upstream to a parent corporation. Further, in a prior Commission order interpreting a parallel provision of the Natural Gas Act, [34] the Commission ruled that a parent corporation did not become a "natural gas company" through the activities of its subsidiaries. [35] Accordingly, we agree with Selkirk Cogen's contention that the definition of electric utility does not contemplate reaching "upstream" to attribute the business character or classification of

an interest held through a wholly owned subsidiary to its parent corporation.

Based on the statements made in the application for recertification, we hold that Selkirk Cogen is not owned by an electric-utility or electric-utility holding company as those terms are defined in our regulations. Accordingly, we find that the ownership criteria of section 292.206 of the Commission's regulations are satisfied.

According to the application for recertification, the technical aspects of the facility remain essentially as described in the original application, with the exception of the minor increase in the gross electric power production capacity discussed above, [36] and the facility will continue to be operated as described therein. Based upon our examination, we find that the facility will meet the operating and efficiency standards set forth in section 292.205 of the

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Commission's regulations. [37] Accordingly, we will grant the application for recertification.

The Commission orders:

Selkirk Cogen's application for recertification of qualifying status filed January 17, 1990 and supplemented on February 21, 1990 and March 27, 1990, pursuant to section 292.207 of the Commission's regulations and section 3(18)(B) of the Federal Power Act, as amended by section 201 of the Public Utility Regulatory Policies Act of 1978, is hereby granted, provided the facility operates as set forth in the application. [38]

-- Footnotes --

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[1] 18 C.F.R. §292.207 (1989).

[2] 55 Fed. Reg. 3250 (1990).

[3] *JMC Selkirk, Inc.*, 48 FERC ¶62,228 (1989). In the original application, JMC Selkirk, Inc. (JMC Selkirk) represented that it was seeking certification on behalf of a yet-to-be-formed joint venture. JMC Selkirk also represented that no electric utility, electric-utility holding company, or combination thereof had any ownership interest in the facility. The facility, therefore, was found to satisfy the criteria set forth in section 292.206 of the Commission's regulations. 18 C.F.R. §292.206 (1989).

[4] The net electric power production capacity remains the same as set forth in the original application, 79.9 MW.

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[5] Old State Management Corporation is a Boston-based company specializing in the development of commercial real estate, cogeneration facilities, and solid waste management projects. The division of its partnership interests between general and limited was not specified in the application.

[6] On April 12, 1990, Selkirk Cogen filed a motion for expedited consideration of its application for recertification as a qualifying cogeneration facility. Selkirk Cogen stated that financing for the project was scheduled to close on May 18, 1990, and that, based on that closing date, commercial operation is planned for the 1991-92 winter season. Selkirk Cogen alleged that delay in closing on the project financing may prevent the project from achieving commercial operation by the 1991-92 winter season, result in significant, unrecoverable cost increases, and forestall the environmental benefits of the project. Selkirk Cogen argued that the application for recertification presents no new issues, is unopposed, and should be promptly approved.

[7] 15 U.S.C. §79b(a)(7) (1988).

[8] *Id.*

[9] *See*, *infra*, n. 12 and accompanying text.

[10] These letters are part of an informal process by which the SEC staff renders interpretative and advisory assistance to members of the general public. Though opinions expressed by SEC staff members do not constitute an official expression of the SEC's views, they do represent the views of the people continuously working with the relevant provisions of the law, and statements by the director of a division may be relied upon as representing the views of that division. *See* 17 C.F.R. §202.1 (1989) (informal procedures generally); 17 C.F.R. §202.2 (1989) (pre-filing assistance and interpretative advice); 17 C.F.R. §200.81 (1989) (confidential treatment procedures); Procedures Available to Requests for No-Action, Securities Act Release No. 6269 (Dec. 5, 1980), reprinted in 21 SEC Docket 839 (Dec. 23, 1980); Procedures for Rendering Informal Advice, Securities Act Release No. 6253, 45 Fed. Reg. 72,644 (Oct. 28, 1980); Procedures for No-Action Letters, Securities Act Release No. 5127, 36 Fed. Reg. 2600 (Jan. 25, 1971). *See also Trenton District Energy Co.*, 42 FERC ¶61,134, at p. 61,508 n.7 (1988).

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[11] Ocean State Power's letter to the SEC, the SEC staff's response, and other SEC staff statements of findings were attached as appendices to Selkirk Cogen's motion for expedited consideration, filed with the Commission on April 12, 1990.

[12] Section 2(a)(3) of PUHCA defines electric-utility company as "any company which owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale . . . ." 15 U.S.C. §79b(a)(3) (1988). The Ocean State Power partnership argues that inclusion of the language term "*used* for . . ." in the definition implies current use. Thus, the Ocean State Power partnership maintains that a company does not become an "electric-utility company" until it is actually using electrical generating or transmission facilities. The SEC staff did not dispute this position in its no-action letter.

[13] Ocean State Power, SEC No-Action Letter (January 15, 1988), included in Appendix A to Selkirk Cogen's April 12, 1990 motion for expedited consideration.

[14] *See* Securities and Exchange Commission, Holding Company Act Release No. 35-24960, Ocean State Power II *et al.* (September 28, 1989).

[15] Section 3(22) of the FPA defines electric utility as "any person or state agency which sells electric energy . . . ." 16 U.S.C. §796(22) (1988). The Commission's regulations add that, for purposes of the ownership criteria for qualifying facilities, a company shall not be considered to be an electric-utility if it: (1) is a subsidiary of an electric-utility holding company which is exempt by rule or order adopted or issued pursuant to section 3(a)(3) or section 3(a)(5) of PUHCA; or (2) is declared not to be an electric-utility company by rule or order of the SEC pursuant to section 2(a)(3)(A) of PUHCA. *See* 18 C.F.R.

§292.206(c) (1989).

[16] A "person" is defined in section 3(4) of the FPA as "an individual or corporation." 16 U.S.C. §796(4) (1988).

[17] In support of its argument, Selkirk Cogen cites *Central Illinois Public Service Co.*, 42 FERC ¶61,073, at p. 61,328 (1988) and *Savannah Electric and Power Co.*, 42 FERC ¶61,240, at p. 61,781 (1988), which address the distinction between a public-utility holding company and the underlying public utility.

[18] 16 U.S.C. §796(18)(B)(ii) (1988).

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[19] 18 C.F.R. §292.206(b) (1989).

[20] *See*, *e.g.*, *CMS Midland, Inc.*, 38 FERC ¶61,244, at p. 61,827 (1987) (citing *Ultrapower 3*, 27 FERC ¶61,094 (1984)).

[21] *See* 38 FERC at p. 61,827.

[22] *See Dominion Resources, Inc.*, 43 FERC ¶61,079, at p. 61,251 (1988).

[23] *See KP Diversified Investors, Inc.*, 32 FERC ¶61,013, at p. 61,050 (1985).

[24] While Selkirk Cogen's application does not provide any specific information as to the division of the stream of benefits from or control of the operation of the facility, it appears that the 79.2-percent general partnership interest attributable to JMC Selkirk gives it a greater than 50-percent equity interest in Selkirk Cogen as that term is interpreted in *Ultrapower 3* and the subsequent cases.

[25] *See* Order No. 70-D, Order Amending Regulations, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶30,234, 46 Fed. Reg. 11,251 (1981).

[26] 18 C.F.R. §292.202(n) (1989).

[27] For a more detailed analysis of the workings of PUHCA as it applies to determining whether a company is an electric-utility holding company, *see Long Lake Energy Corporation*, Docket No. EL90-4-000, also decided today [51 FERC ¶61,262].

[28] 15 U.S.C. §79b(a)(7) (1988) (emphasis supplied). Section 2(a)(7) goes on to state that the SEC, "upon application, shall *by order* declare that a company is not a holding company" if certain condition are met. Such an order by the SEC may later be revoked by a superseding order whenever, in the SEC's judgment, the applicable conditions are no longer satisfied. *Id.* (emphasis supplied). Further, under the PUHCA definition of a holding company, the SEC may determine, by order, that a company which may appear to qualify as a holding company by virtue of its interest in a public utility is *not* a holding company. *See* 15 U.S.C. §79b(a)(7)(A). Conversely, under section 2(a)(7)(B) of PUHCA, the SEC may determine, after notice and opportunity for hearing, that any person which directly or indirectly exercises a controlling influence over the management or policies of a public utility or holding company, regardless of the extent of the ownership, is a holding company. *See* 15 U.S.C. §79b(a)(7)(B).

Also, under section 2(a)(3) of PUHCA, the SEC may, by order, declare that a company operating facilities used for the generation, transmission, or distribution of electric energy for sale is not an electric-utility company. *See* 15 U.S.C. §79b(a)(3) (1988). Such a declaration could affect a company's holding company status, since, under the Commission's regulations, the SEC's determination on this issue is respected. *See* 18 C.F.R. §292.206(c) (1989).

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[29] *See supra* n. 14.

[30] 15 U.S.C. §79b(a)(11) (1988).

[31] We stress that our decision is limited to a finding that J. Makowski is not an electric-utility holding company as that term is defined in our regulations.

[32] *See Trenton District Energy Co.*, 42 FERC ¶61,134, at pp. 61,509-10 (1988). Of course, if the SEC classifies J. Makowski as an electric-utility holding company, the Selkirk facility would no longer comply with statements contained in its application and our order could not be relied upon. *See CMS Midland, Inc. et al.*, 50 FERC ¶61,098, at p. 61,277. While this would not necessarily affect whether the facility, as then structured, is a qualifying facility, *see id.*, in the event the SEC rules that J. Makowski is an electric-utility holding company, a re-evaluation of Selkirk Cogen's qualifying status will be necessary.

[33] *See* 16 U.S.C. §§796(3), (4) (1988).

[34] *See* section 2(6) of the Natural Gas Act, 15 U.S.C. §717a(6) (1988). Parallel provisions of the FPA and the Natural Gas Act should be interpreted in the same manner. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981); *Gulf States Utilities v. Alabama Power Co.*, 824 F.2d 1465, 1470 n.5 (5th Cir. 1987).

[35] *See Sunshine Mining Co.*, 36 FERC ¶61,186, at p. 61,476 (1986).

[36] *See supra* note 4, and accompanying text.

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[37] 18 C.F.R. §292.205 (1989).

[38] Certification as a qualifying facility serves only to establish eligibility for benefits provided by the Public Utility Regulatory Policies Act of 1978, as implemented by the Commission's regulations, 18 C.F.R. Part 292. It does not relieve a facility of any other requirements of local, state and federal law, including those regarding siting, construction, operation, licensing and pollution abatement. Certification does not establish any property rights, resolve competing claims for a site, or authorize construction.